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Coalition Operations and the Law

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This paper addresses the practical side of the application of the law of armed conflict and domestic law requirements during coalition combat operations; highlighting areas where different legal structures or divergent national interpretation of the applicable international framework may have significant impact. I am going to do this by briefly canvassing three such areas in the context of Operation Enduring Freedom. Two of these are directly related to the topic of combatants and civilians. The third is a completely distinct topic—the conduct of coalition investigatory boards.

Coalition Boards of Inquiry

The first area I would like to discuss is coalition boards, using the Coalition Board that was convened by the United States Air Force to investigate the Tarnak Farms Range friendly fire incident and the Canadian Board of Inquiry that was ordered by the Minister of National Defence (MND) to investigate the same incident as a focus. I do not intend, however, to comment on any substantive findings of either board. Rather, my emphasis will be on the procedural issues that arose during the conduct of the concurrent boards that were investigating the incident and the resolution of those issues.

The facts are undisputed. On the evening of April 17, 2002, soldiers from Alpha Company, Third Battalion, Princess Patricia's Canadian Light Infantry were

engaged in a night live fire training exercise at Tarnak Farms Range just south of Kandahar, Afghanistan. While the Canadian soldiers were training, two US F-16 fighter aircraft were returning from an on-call mission to support coalition ground forces. As the aircraft passed south of Kandahar, the flight leader observed what he described as fireworks coming from an area a few miles south of Kandahar. Perceiving this as surface-to-air fire, the pilot asked for and received permission from the mission crew of a US Airborne Warning and Control System (AWACS) aircraft to determine the precise coordinates of the surface-to-air fire. While attempting to obtain the coordinates, the pilot of the second aircraft, the wingman, requested permission to fire on the location with his 20-millimeter cannon. The AWACS crew told him to stand by, and later requested that the wingman provide additional information on the surface-to-air fire while directing him to hold fire. The pilot immediately responded "I've got some men on a road and it looks like a piece of artillery firing at us. I am rolling in in self defense." The pilot then called "bombs away" as he released one 500-pound GBU-12 laser-guided bomb. The bomb struck a Canadian fire position at Tarnak Farms. Four Canadians were killed, eight were wounded.

As a result of this tragic incident, two boards, one exclusively Canadian and one American with a Canadian co-chairman (Coalition Board), were convened to investigate the incident.

However, although each Board was investigating the same incident, the primary purpose for the respective investigations was quite different. As will be highlighted later, this difference in purpose had significant impact on the procedural processes applicable to each board.

The primary purpose for the Coalition Board was of a disciplinary nature. This board was convened with the specific mandate to make disciplinary recommendations, if such were warranted. The Canadian Board of Inquiry was convened under Section 45 of the National Defence Act whereby the MND may convene such a board when it is appropriate for the MND to be informed on a matter connected with the Canadian Forces or that affects a member thereof. The primary purpose of the Canadian board was quite different than that of the Coalition Board. It was convened for administrative/safety purposes and was designed to meet the Canadian public expectation that this tragic incident would be investigated in a balanced and transparent manner. Recommendations as to potential disciplinary action were never contemplated and under Canadian jurisprudence, the conduct of the investigation could have, in fact, prejudiced future criminal/disciplinary action.

The conduct of simultaneous investigatory boards into the same incident, with different purposes, poses unique challenges. The first is that of sharing and disclosure of information. This issue has two facets: first, how to ensure both boards had access

to the necessary information to reach informed conclusions and recommendations; and second, what information could be publicly disclosed once the respective boards had completed their investigation and made their recommendations.

Because the co-chairman of the Coalition Board was Brigadier General Marc Dumais, a Canadian, one obvious option for the sharing of the requisite information would have been to use General Dumais as a conduit of information between the two boards. This option was not a viable one because of the significant impact such an arrangement could have on the perceived independence and impartiality of each board. The second option, and the one that was utilized, was the establishment of a protocol for the release of information to the boards. This protocol established the process for requesting documentary evidence and witnesses and set out the parameters under which the information could be released. In the case of requests by the Canadian Board of Inquiry for information from US authorities, these parameters formed part of the legal basis for the determination of what information could be released publicly. In light of the *raison d'etre* (a balanced and transparent investigation) for the Canadian Board of Inquiry and the fact that it had been Canadian soldiers who had been injured or died, as much public disclosure as possible was of great importance. Equally important, however, was the desire not to release classified information, personal information protected from release under privacy legislation or information the release of which could impact on potential disciplinary proceedings. Balancing these conflicting priorities takes a great deal of coordination and cooperation between national authorities to ensure consistent and coordinated public release of information. One of the most important lessons learned in this whole process is never assume full knowledge of the legal and political constraints a coalition partner may be operating under, particularly when dealing with such an emotion charged issue as the death of coalition soldiers as a result of friendly fire. Even for Canada and the United States, who share such similar legal, political and cultural foundations, reaching a compromise that addressed both countries concerns took significant effort and coordination and, I might add, a lot of late nights, last minute panics and very senior intervention.

Returning to the initial theme of the impact of procedural processes adopted by the respective boards as a result of their differing primary purposes, I'd like to touch briefly on the issue of compellability of witnesses. As I understand it, no witness could be compelled to testify before the Coalition Board. In contrast, the Canadian board could compel anyone subject to Canadian law to testify, but their testimony could not be used as evidence in a legal proceeding (civil, disciplinary or criminal), save for perjury charges. This striking difference in procedural process is directly linked to the primary purpose for the convening of the board. In the Canadian context, because no evidence given to a Board of Inquiry can be used in future

legal proceedings, witnesses can be compelled to testify because it does not impact on their fundamental right "not to be compelled to be a witness in proceedings against oneself." Because the purpose of the investigation is an administrative one, tied primarily to safety issues, the balance is tipped in favor of compelling the witnesses to testify in the interests of a full exploration of the facts.

Having now identified in a very cursory manner some of the legal interoperability issues related to coalition boards let me close this issue by saying that I believe that none of these challenges are insurmountable. In fact, in this instance I believe these differences in process, dictated largely by different national legal standards, actually enhanced the credibility of the findings and recommendations of the respective Boards. In the case of the Tarnak Farms tragedy, the structured process that evolved for disclosure of information to the respective boards, ensuring that there was no collusion or collaboration between the boards, led to the public perception that there had been a balanced and transparent investigation into the matter. A closer relationship between the two boards during the investigative process may not have resulted in the same perception.

Transfer of Detainees

The second area where different legal structures or divergent national interpretation of the applicable international framework may have an impact on operations is that of the transfer of detainees to another coalition partner. Let me again paint a brief background of the issue in the context of Operation Apollo, Canada's contribution to Operation Enduring Freedom. Throughout the campaign against terrorism, the tasks and capabilities of Canadian Forces (CF) units, as well as some other coalition partners, deployed in the theater of operations did not permit the long-term detention of persons detained by the CF. Persons detained by the CF were either released or evacuated from the point of capture to a facility where proper screening, long-term treatment and security could be ensured. For Operation Enduring Freedom, the United States assumed the responsibility of establishing and maintaining the coalition's short- and long-term detention facilities in Afghanistan and Guantanamo Bay, Cuba. The Government of Canada has noted several times that Canada, as a coalition partner, will, as a general rule, transfer persons detained by the CF, and who are suspected members of the Taliban and al-Qaida, to the United States.

I would like to highlight some of the legal issues that may impact on the decision of a coalition partner whether or not to transfer detainees to another coalition partner. As with so many other issues related to international law these are not "black letter law" issues and different coalition partners will likely have different

interpretations of the applicable law or even what is the applicable law. This, of course, is one of the significant challenges of coalition operations.

Before addressing the specifics of these legal issues, let me provide an example of how fundamental these different interpretations can be. As part of the overall campaign against terrorism, Canada and its coalition partners are engaged in an armed conflict and are exercising their inherent right of collective and individual self-defense against the al-Qaida and the Taliban. But what is the legal regime applicable to these hostilities? Generally, where a State is entitled to use force in an armed conflict, it must conduct hostilities in accordance with international law, particularly the law of armed conflict. However, al-Qaida is a non-State entity (not qualifying as a "national liberation movement") and prior to September 11th most States rejected the Taliban as the legitimate government of Afghanistan (previous legitimate governments of Afghanistan had signed and ratified the Geneva Conventions of 1949[2]). This has led to a debate as to whether the coalition partners are engaged in an international or non-international armed conflict and, if one accepts that it is an international armed conflict, whether the Geneva Conventions and the 1977 Additional Protocol I[3] apply as a matter of conventional law to the conflict. For example, on February 7, 2002, the United States announced that although it has never recognized the Taliban as the legitimate Afghan Government, the President determined that the Taliban members are covered by the Geneva Conventions because Afghanistan is a party to them. Other coalition partners may have taken the view that the Geneva Conventions and the 1977 Additional Protocol I may not technically apply to the conflict as a matter of strict conventional or treaty law. However, regardless of the legal position adopted by coalition partners, all coalition partners are applying the same standards, either as a matter of law or policy.

What is the legal authority for one coalition partner to transfer detainees to another coalition partner?

Turning now to the specific issue of transfer of detainees from one coalition partner to another, one issue that legal advisors may have to analyze prior to a decision being made is whether there is legal authority for such a transfer. Geneva Convention (III) Relative to the Treatment of Prisoners of War provides for the transfer of prisoners of war to other nations who are willing and able to abide by the Convention's obligations for the handling and treatment of such persons. In particular, Article 12 states: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the *willingness and ability* of such transferee Power to apply the Convention." (Emphasis added.) There are no specific provisions for those detained persons who have taken part in hostilities but are not entitled to prisoner of

war status (i.e., unlawful combatants) and therein may be the rub for some coalition partners.

In the context of Operation Enduring Freedom, a review of US treatment of detainees at Kandahar and Guantanamo Bay and statements made by President Bush, indicate the United States is willing and able to apply the appropriate international law standards. In particular, on February 7, 2002, the White House clarified the US position on the applicability of the Geneva Conventions to members of the Taliban and al-Qaida.[4] The White House Spokesman's comments can be summarized as:

- The United States is committed to applying the principles of the Geneva Conventions;
- The United States applied the Geneva Conventions (including Article 4 of Convention III) to the Taliban and made a blanket determination that members of the Taliban are not prisoners of war;
- The United States has decided not to apply the Geneva Conventions to members of al-Qaida because they do not represent any State that is a party to the Geneva Conventions. Accordingly, they cannot have prisoner of war status under the Geneva Conventions;
- The United States will treat all detainees humanely and consistent with the principles of the Geneva Conventions; and
- The International Committee of the Red Cross (ICRC) has been allowed, and will continue to have, access to facilities and detained persons.

In circumstances such as this, it may be reasonable to argue that a coalition partner can transfer these unlawful combatants to the United States in accordance with standards analogous to the provisions of Article 12 of Geneva Convention III.

Are blanket determinations of PW status permissible under international law? Even if a coalition partner is satisfied that the receiving State is willing and able to apply the Geneva Conventions and other appropriate international legal standards, the issue of the reasonableness of a blanket determination that members of a group are not entitled to prison of war status may be problematic. This was potentially an issue for coalition partners during the campaign against terrorism. On the one hand, you have the position that such blanket determinations are supportable under international law if based on appropriate evidence. (The United States decided that members of the Taliban and al-Qaida are not entitled to prisoner of war status. This was based on its determination that al-Qaida met none of the requirements for prisoner of war status—a responsible commander, a distinctive

and visible insignia, the open bearing of arms and compliance with the laws and customs of war. The Taliban failed to meet the last requirement.)

On the other hand, you have the argument that Article 5 of Geneva Convention III requires a case-by-case evaluation of the status of detained persons if prisoner of war status is not being conferred, based on the plain reading of Article 5. Article 5 addresses the issue of the legal status of a captured or detained person who has committed a belligerent act. It notes that a person who is classified as a "combatant" under Article 4 will be treated in all respects as a prisoner of war. If there is any doubt about whether a detainee is entitled to prisoner of war status, Article 5 delineates the requirement to conduct a status determination tribunal as follows:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [i.e., combatants], such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.

One could argue that a simple way for a coalition partner to solve this debate is to conduct its own status determination hearing prior to transfer, but there is no requirement at law to do so and this approach ignores the reality of the operational situation where it may be impossible to do so in a timely and effective manner.

What is the impact on the decision to transfer if it is known at the time of transfer that a detainee is likely to be charged and may be subject to the death penalty and/or judicial proceedings that may not meet minimal fair trial guarantees under international or domestic law?

This, of course, is the thorny issue of transferring detainees to a State whose penal code authorizes the death penalty or has a judicial system with less procedural guarantees than those found under the coalition partner's law. International law, including the law of armed conflict, contemplates that detainees, including prisoners of war and unlawful combatants, may be subject to judicial proceedings and ultimately sentenced to death.[5] International law imposes minimum legal standards on the conduct of these proceedings. Unlawful combatants may be prosecuted as criminals for having taken part in hostilities. Prisoners of war could be liable for prosecution if they committed violations of the laws of war.

The real legal issue for coalition operations, however, is likely to be how the domestic law of the respective coalition partners impacts on the transfer of detainees to a coalition partner, who could potentially subject the detainee to the death penalty. Unlike the United States, most other western nations' domestic human rights standards have some extraterritorial application to aliens. For example, Section 7

of Canada's Charter of Rights and Freedoms guarantees individuals the right not to be deprived of their life, liberty or security of the person except in accordance with the principles of fundamental justice. The Supreme Court of Canada has held that extradition to face the death penalty[6] or immigration removal where there is a substantial risk of torture[7] would violate Section 7 in all but exceptional circumstances. Arguably the issue of transfer of detainees in the context of a military operation abroad is quantifiably different than the extradition or immigration removal of a person who is on Canadian territory, but the application of the Charter to such operations has yet to be addressed by Canadian courts. In a similar vein, the European Court of Human Rights ruled in *Bankovic*[8] that while Article 1 of the European Convention on Human Rights[9] contemplates the ordinary and essentially territorial notion of jurisdiction, extra-territorial jurisdiction by a contracting state is possible in exceptional circumstances depending on the particular circumstances of each case.

Additional Protocol I—Article 51(3)

The final issue I would like to touch on today is what Hayes Parks calls the "revolving door" for certain civilians provided by Article 51(3) of Additional Protocol I. As a trade-off for the protection they enjoy against the dangers arising from military operations, civilians should not directly participate in hostilities. According to Article 51(3) of Additional Protocol I, their direct participation in hostilities automatically entails loss of immunity from attack "*for such time as they take a direct part in hostilities.*" In principle, the trade-off does not appear to be problematic, particularly in the context of those armed conflicts where there is no difficulty in precisely defining combatant and civilian status. But in the context of Operation Enduring Freedom, the practical application of this temporal limitation could be problematic, particularly from a targeting perspective. How can the period during which a civilian who directly participates in hostilities loses immunity from attack be defined in practical terms? Does it mean that civilians only lose their protected status and become lawful targets while they carry a weapon and they revert to their protected status once they throw down their weapon or return home from a day in the trenches? Or do they continue to be lawful targets so long as they perform the functions of combatants, such as planning and command as well as the actual conduct of operations? There is no international consensus on this issue and these are not academic questions, the answer to which is of no practical import. Nor are they only relevant to those nations who are parties to Additional Protocol I. Targeting decisions will remain subject to legal review as part of the accountability process that is integral to the principle of command responsibility. There will be an effect

on the whole coalition as a result of each partner's interpretation on this issue as each nation's position on this issue may have a direct impact on the targets assigned to each partner by the coalition commander.

Notes

1. Captain M. H. (N) McDougall, Canadian Forces, is the Deputy Judge Advocate/Operations.
2. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilians Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.
3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in id.* at 422.
4. See the White House statement on the applicability of the Geneva Conventions, *available at* www.CBC.CA "US Guarantees Rights to Taliban Detainees," Feb. 8, 2002 and *at* www.CNN .Com "Bush: Geneva Treaty Applies to Taliban Detainees,"Feb. 7, 2002.
5. For example, see Geneva Convention (III), Articles 99–107 of Part III (Judicial Proceedings), and Geneva Convention (IV), Articles 64–68 of Part III, Section III (Occupied Territories), DOCUMENTS ON THE LAWS OF WAR, *supra* note 2.
6. United States v. Burns [2001] 1 S.C.R. 283.
7. Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3.
8. Bankovic and Others v. Belgium and 16 Other Contracting States, 2001-XII Eur. Ct. H.R. 333 (Grand Chamber).
9. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222.